FEB 14 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-972

UNITED STATES OF AMERICA,
Petitioner

v.

STANLEY APFELBAUM,
Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Stanley Apfelbaum, respectfully requests lease to file the attached Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

Respondent's Affidavit in support of this Motion is attached hereto.

Joel Harvey Slomsky

JOEL HARVEY SLOMSKY
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Attorney for Respondent
Stanley Apfelbaum

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 197

NO. 78-9' 2

UNITED STATES OF AMERICA,
Petitioner

v.

STANLEY APFELBAUM,
Respondent

A F F I D A V I T

I, Stanley Apfelbaum, being duly sworn according to law, depose and say in support of my Motion for leave to proceed without being required to prepay costs or fees:

1. I am the respondent in the above entitled case.

2. Because of my poverty, I am unable to pay the costs of said case.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress that I seek in said case.

5. The nature of said case is briefly stated as follows:

I am filing a Brief in Opposition to the Government's Petition to the United States Supreme Court wherein the Government seeks a reversal of the decision of the Third Circuit Court Appeal granting me a new trial.

Stanley Apfelbaum
STANLEY APFELBAUM

Sworn to and subscribed:
before me this 12th day:
of February 1979:

Helen Tangrade
Notary Public

Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires Dec. 21, 1981

FILED
FEB 14 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-972

UNITED STATES OF AMERICA,
Petitioner

v.

STANLEY APFELBAUM,
Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORATI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Attorney for Respondent
Stanley Apfelbaum

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-972

UNITED STATES OF AMERICA,
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v.

STANLEY APFELBAUM,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent, Stanley Apfelbaum, by his attorney, Joel Harvey Slomsky, Esquire, prays that the Petition for Writ of Certiorari filed by the Government in the above matter be denied, and respectfully submits the following Brief in opposition thereto.

QUESTION PRESENTED

1. IS THE GOVERNMENT PERMITTED UNRESTRICTED USE OF A GRAND JURY WITNESS' TRUTHFUL IMMUNIZED TESTIMONY AT A TRIAL OF THAT WITNESS FOR FALSE SWEARING WHEN SUCH STATEMENTS HAVE NOT BEEN CHARGED AS THE CORPUS DELECTI OF THE FALSE STATEMENT OFFENSE?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part:

> "No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

"Section 201(a) of the Organized Crime Control Act of 1970, 18 U.S.C. 6002, provides:

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to--

(1) a court or grand jury of the United States,
(2) an agency of the United States, or
(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

STATEMENT OF THE CASE

For purposes of this Brief, respondent accepts the procedural history and facts set forth in petitioner's Statement of the Case with the following additions:

At the trial of this case, the government introduced practically overwhelming evidence, independent of the immunized grand jury testimony, that respondent, Apfelbaum, lied when he denied trying to locate Harry Brown in Florida in December 1975 (Count I), and lied when he denied telling FBI agents that he had lent $10,000.00 to Brown (Count II).

Not being satisfied with this evidence of falsity, the government then read to the jury in its case in chief, over defense objection, portions of the immunized grand jury testimony not specified in the indictment. The record in this case

is totally devoid of any evidence that any of the following immunized testimony referred to in the Third Circuit's opinion is false (584 F.2d at 1268):

> "The immunized testimony introduced at trial related to a range of topics relevant to the prosecution's case. These included inter alia (1) the degree of friendship between Apfelbaum and Brown (App. 96a-98a); (2) the circumstances surrounding Apfelbaum's discovery of, and visit to, Brown in Florida in 1976 (App. 107a, 110a, 124a-29a); (3) whether Apfelbaum and Brown discussed any loan transactions while in Florida (App. 112a); (4) whether Brown "patted down" Apfelbaum for weapons during his visit, or merely hugged him (App. 133a); (5) Apfelbaum's denial that he ever engaged in financial transactions with the Chestnut Hill dealership other than a $500 loan (App. 114a); (6) Apfelbaum's denial that he ever co-signed a loan for Brown (App. 115a); (7) a statement that Apfelbaum was introduced to one John Orem by Harry Brown (App. 116)."

The government claimed in the District Court and Third Circuit Court of Appeals that they "doubted" the truth of his testimony. The government never offered any evidence to show such testimony was false. It appears from its Petition for a Writ of Certiorari that the government has abandoned its claims of falsity which were based upon sheer speculation. It now argues that as long as a perjury prosecution is brought, it has the right to unrestricted use of relevant truthful immunized testimony. This position was rejected by the Third Circuit.

REASONS FOR DENYING THE PETITION

1. NO COURT OF APPEALS HAS ALLOWED THE GOVERNMENT TO USE TRUTHFUL IMMUNIZED GRAND JURY TESTIMONY COMPELLED UNDER 18 U.S.C. §6002 TO PROVE SCIENTER OR THE FALSITY OF OTHER GRAND JURY TESTIMONY.

The Seventh and Third Circuits both agree that immunized testimony may be used only to the extent necessary to establish the corpus delecti of the charged perjury "together with no more than the minimal testimony essential to place the charged falsehood into its proper context". Apfelbaum, 584 F.2d at 1270,

n.9; United States v. Patrick, 542 F.2d 381, 385 (7th Cir.), cert. denied, 430 U.S. 931 (1977).

The Second and Tenth Circuits have held that immunized testimony may be used for any purpose if it is false, but that truthful immunized testimony may not be used at all, even in a prosecution for perjury. See United States v. Dunn, 577 F.2d 119, 125-126 (10th Cir. 1978), cert. granted, No. 77-6949 (December 11, 1978,[1] United States v. Berardelli, 565 F.2d 24, 28 (2d Cir. 1977).

In United States v. Kurzer, 534 F.2d 511, 518 (2nd Cir. 1976), the Second Circuit explained as follows:

> "Tramunti (500 F.2d 1334) permitted the Government, in a prosecution for perjury at a criminal trial, to use for impeachment purposes and as evidence of prior similar acts false testimony given by the defendant while immunized on a prior occasion. We reasoned that the immunity like the privilege itself, covers the incriminatory truth, not the exculpatory falsehood. 500 F.2d at 1342, 1345. But the Government's argument here goes much further, for it would permit the use, if the prosecutor felt the immunized witness was not truthful in all respects, not only of the false testimony, but also of the truthful and incriminatory information given by the witness, contrary to the reasoning of Tramunti. We decline to go so far." (Emphasis Added).

In the instant Petition, the government claims it can use all relevant truthful immunized grand jury testimony to prove scienter or falsity. No court of appeals has approved such use of truthful immunized testimony under 18 U.S.C. §6002.

The truthful portions of respondent's immunized grand jury testimony read to the jury were not inconsistent with the testimony claimed to be false in the indictment. Moreover, under Apfelbaum, supra, the government is not precluded from introducing testimony essential to place the charged falsehood into its

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[1] As the government concedes in its Petition for a Writ of Certiorati at p. 19, the decision by this court in Dunn will not necessarily control the disposition of this case.

proper context. In this regard, the government's claim that the Third Circuit's decision will impair its ability to prosecute witnesses for perjury committed under a grant of immunity is purely speculative. In the instant case, the evidence, apart from the truthful immunized testimony, was more than ample to convict. There was no need here for the government to violate the immunity grant and the Fifth Amendment by introducting truthful portions of the grand jury testimony.

2. THE THIRD CIRCUIT'S HOLDING THAT GRAND JURY TESTIMONY WHICH IS COMPELLED UNDER A GRANT OF IMMUNITY MAY BE UTILIZED ONLY AS THE CORPUS DELECTI OF AN INDICTMENT FOR PERJURY OR FALSE SWEARING IS ENTIRELY CONSISTENT WITH 18 U.S.C. §6002 AND THE FIFTH AMENDMENT.

The opinion of the Third Circuit explains in great detail the reasons and precedent underlying its holding in Apfelbaum that grand jury testimony which is compelled under a grant of immunity may be utilized only as the corpus delecti of an indictment for perjury or for false swearing. 18 U.S.C. §6002 broadly provides in relevant part that "no testimony or other information compelled under the [immunity] order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with the order". As the Third Circuit stated in Apfelbaum, 584 F.2d at p. 1269:

> "A grant of "use and fruits" immunity conferred under 18 U.S.C. §6002 may indeed substitute for the fifth amendment privilege, but only because its protection against the subsequent use of the compelled testimony is coextensive with the scope of the privilege. Kastigar v. United States, 406 U.S. at 453. That is, the grant of the immunity must, by definition, afford the witness the same protection he would have received had he invoked the privilege. See Kastigar v. United States, 406 U.S. at 462; United States v. Frumento,

552 F.2d 534, 542-43 (3d Cir. 1977) (en banc); United States v. Kurzer, 534 F.2d 511, 516 (2d Cir. 1976). Because a witness who has properly invoked the privilege may remain silent, see Kastigar v. United States, 406 U.S. at 461, use and fruits immunity under section 6002 "prohibits the prosecutorial authorities from using the compelled testimony in any respect". Id. at 453 (emphasis in original); accord, United States v. Frumento, 552 F. 2d at 543; United States v. Hockenberry, 474 F.2d 247 (3d Cir. 1973). Put another way, invocation of the privilege would have left Apfelbaum in a position where he would not have answerd questions, truthfully or falsely, and thus such answers could not have been used against him. In the words of the Constitution, he would not have been compelled to "be a witness against himself". (Footnote omitted)."

Once a witness testifies falsely, however, he is subject to a perjury or false swearing prosecution. Apfelbaum and other Third Circuit cases, United States v. Frumento, supra, and United States v. Hockenberry, supra, do not prohibit a perjury prosecution, but merely hold that use of the witness' immunized testimony is limited only to its use as the basis of a perjury indictment. If the government has evidence that immunized testimony is perjurious, its remedy is to indict the witness for perjury and to specify in the indictment the false testimony.

Any use of truthful immunized testimony as substantive evidence by the government would be a violation of the immunity grant, result in compelling a person to "be a witness against himself" in violation of the Fifth Amendment, and offend Kastigar v. United States, supra.

3. THE THIRD CIRCUIT'S DECISION IS NOT CONTRARY TO THIS COURT'S OPINION IN CAMERON V. UNITED STATES, 231 U.S. 710 (1914).

The government contends that the Third Circuit's opinion is contrary to Cameron v. United States, 231 U.S. 710 (1914). Cameron is vastly different factually from the instant case. In Cameron, the defendant was indicted twice for committing

perjury in two separate bankruptcy proceedings. The first indictment alleged that the defendant lied when he testified before a special examiner and commissioner prior to being adjudicated a bankrupt as follows:

> "First. That he, the said Albert B. Cameron, the aforesaid witness, shortly prior to the filing of the aforesaid petition in bankruptcy, against the said Knickerbocker Piano Company, had sold a number of pianos to William C. Smith, the petitioner in bankruptcy aforesaid.
> "Second. That he, the said Albert B. Cameron, the witness aforesaid, had a conversation with the said William C. Smith, concerning the sale to him of pianos by him, the said Albert B. Cameron.
> "Third. That he, the said Albert B. Cameron, the aforesaid witness, had sold to the said William C. Smith, eight pianos for the sum of six hundred and sixty-eight dollars."

The second indictment alleged that the defendant lied when he testified before a bankruptcy referee as follows:

> "First. That he, the said Albert B. Cameron, had not been able to obtain the address of the said William C. Smith and had never known the said address.
> "Second. That he, the said Albert B. Cameron, had had a conversation or conversations with the said William C. Smith in regard to his, the said William C. Smith's buying pianos of and from the said alleged bankrupt."

At trial, the defendant objected to the government reading into evidence portions of his testimony given before the commissioner which directly contradicted testimony before the referee. The court held that such use of immunized testimony violated the immunity grant.

In the instant case, the government has attempted to use truthful immunized testimony to prove that other portions of grand jury testimony were false. Cameron appears to reject this approach in accordance with the decisions of the courts of appeals.

In Cameron, the court, while discussing Glickstein v. United States, 222 U.S. 139 (1911) which held that a witness may be prosecuted for perjury committed while giving immunized testimony, stated at p. 720-721: "We cannot agree with petitioner's contention that the use of such testimony is limited to proving that it was in fact given. In prosecutions for perjury the statute saved the right to use such testimony for any legitimate purpose in establishing the charge made". The government contends that these two sentences allow it wholesale use of pages and pages of relevant truthful grand jury testimony provided a perjury charge is brought. However, at the very least, for this quote to be consistent with the Fifth Amendment, it would require that the use of such testimony be limited to testimony demonstrably false. The Third Circuit requires the false testimony to be set forth in the indictment. The Second and Tenth Circuits appear to require the government to make a show as to the falsity of other immunized testimony, apart from the testimony claimed to be false in the indictment, before such testimony can be used at a perjury trial. See Apfelbaum, 584 F.2d at 1272, n. 10.

For the above reasons, Cameron v. United States, supra, is not inconsistent with the Third Circuit's decision, but appears to be in accord with Apfelbaum.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Joel Harvey Slomsky

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